



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable George H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. 0-5260

Re: Whether tax levied by Section 1, Chapter 184, Article X, Acts 1941, 47th Legislature, p. 269, accrues on proceeds of sales of radios, cosmetics and playing cards made at retail to the Federal Government, and related questions.

In your letter of April 27, 1943, you request our opinion on the following facts:

"I am attaching hereto letter I received from Joske Bros. Co., San Antonio, with copies of letters from Captain E. G. Brown, Finance Officer for Randolph Field, relative to the levy of the 2% tax under Section 1, Article X, of House Bill 8, Regular Session of the Forty-seventh Legislature, and will thank you to advise this department whether Joske Bros. Co. will be subject to the tax from the proceeds of sales made by them to the Federal Government on commodities covered by Section 1, Article X, of House Bill 8.

"This department has directed Joske Bros. Co. that they are liable for the tax."

Joske Bros'. letter contains, in part, the following facts:

Honorable George H. Sheppard, page 2

"We are continuing to experience a great deal of difficulty in connection with the collection of taxes due under Article X of House Bill 8 on sales we make to the United States Government.

"The Government orders are submitted to us, we fill them, and bill them for the amount of the sale including the tax. In every instance they forward us a check in payment for the bill less the amount of the tax and enclose with their check a tax exemption certificate. We repeatedly advised them that we have secured from you a ruling to the effect that the state cannot accept these tax exemption certificates.

"We have a very extensive file of correspondence on this subject. The position taken by the Government in all of these letters is the same. Many of these matters are still unsettled. We are still maintaining the position that the amount of the tax must be paid, since we cannot submit the tax certificates to your office.

"At the suggestion of Captain E. G. Brown, Finance Officer for Randolph Field, a letter was written by him to the Comptroller General of the United States on this subject. I am enclosing a copy of the letter which Captain Brown sent to me on March 18th advising that the matter had been referred to the Comptroller General, and, also, his letter of April 1st addressed to me advising me of the decision reached after he had received his reply from the Comptroller General of the United States."

Captain Brown's letter of April 1, 1943, is as follows:

"With reference to our telephone conversation today, we will proceed with payment of your invoice under date of February 16, 1943, for the amount of invoice less tax.

Honorable George H. Sheppard, page 3

"Your attention is invited to decision A-51249, October 4, 1933 of Vol. 13, page 91 of Decisions of Comptroller General, which provides that any state '... is without authority to tax the United States on such purchases as may be necessary for the conduct of the business of the Federal Government.'"

Section 1, Chapter 184, Article X, Acts 1941, 47th Legislature (codified by Vernon as Article 70471) provides:

"Radios, cosmetics, cards; luxury excise tax; penalty for making false report or failure to report.

"Section 1. Each person, partnership, association, or corporation selling at retail new radios or new cosmetics, shall make quarterly on the first days of January, April, July and October of each year, a report to the Comptroller, under oath of the owner, manager, or if a corporation, an officer thereof, showing the aggregate gross receipts from the sale of any of the above-named items for the quarter next preceding; and shall at the same time pay to the Comptroller a luxury excise tax equal to two (2) per cent of said gross receipts as shown by said report.

"Every person, partnership, association, or corporation, selling at retail, playing cards shall make quarterly report as provided above showing the total number of packs or decks of such cards sold during the preceding quarter, and shall at the same time pay to the Comptroller a luxury excise tax of five (5) cents per pack or deck of such playing cards so sold.

"Nothing herein shall be construed so as to require payment of the tax on gross receipts herein levied more than once on the proceeds of the sale of the same article of merchandise. A retail sale as used herein, means a sale to one who buys

Honorable George H. Sheppard, page 4

for use or consumption, and not for resale. Gross receipts of a sale means the sum which the purchaser pays, or agrees to pay for an article or commodity bought at retail sale."

The opinion of the Comptroller General, referred to in Captain Brown's letter, was dated October 4, 1933, and cited as authority *Panhandle Oil Company v. State of Mississippi*, 277 U. S. 218, 72 L. Ed. 857, 48 S. Ct. 451, 56 A. L. R. 483. The correctness of the *Panhandle* case "is now open to serious question." The tax involved in Comptroller General's decision was a retail sales tax on the consumer or purchaser --not a vendor's tax (as we have here), measured by gross receipts. This Department held in opinion O-4403A that the tax in question was a gross receipts tax, not a sales tax, and was not levied against the retail purchaser.

Panhandle Oil Company v. Mississippi, supra, involved sales directly to the United States for the use of its Coast Guard Fleet in service in the Gulf of Mexico and its Veterans' Hospital at Gulfport. It arose under a law of the State of Mississippi which provided that "any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1¢ (one cent) per gallon upon the sale of gasoline. . . ." The oil company did not pay taxes on such sales to the United States, and the State brought suit. The company defended on the ground that this statute, and its amendments, if construed to impose taxes on such sales, was repugnant to the Federal Constitution. That contention was sustained in the trial court, and the state appealed. The Supreme Court of the United States held that the State was not entitled to collect the tax from the *Panhandle Oil Company* upon the gasoline sold by it to the Federal Government.

Mr. Justice Butler, who wrote the majority opinion of the Court, said:

"The right of the United States to make such purchases is derived from the Constitution.

Honorable George H. Sheppard, page 5

The petitioner's right to make sales to the United States was not given by the state and does not depend on state laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.

"The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales to the government. *Wagner v. Covington*, 251 U. S. 95, 192, 64 L. Ed. 157, 167, 40 Sup. Ct. Rep. 93. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its constitutional powers to operate the fleet and hospital. *M'Culloch v. Maryland*, supra, 436 (4 L. Ed. 608); *Gillespie v. Oklahoma*, supra, 505 (66 L. Ed. 340, 42 Sup. Ct. Rep. 171); *Jaybird Min. Co. v. Weir*, 271 U. S. 609, 613, 70 L. Ed. 1112, 1114, 46 Sup. Ct. Rep. 592. To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Frick v. Pennsylvania*, 268 U. S. 473, 494, 69 L. Ed. 1058, 1064, 42 A. L. R. 316,

Honorable George H. Shepard, page 6

45 Sup. Ct. Rep. 603. And that is to tax the United States--to exact tribute on its transactions and apply the same to the support of the state.

"The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammelled. *Osborn v. Bank of United States*, 9 Wheat. 738, 867, 6 L. Ed. 204, 234; *Western U. Teleg. Co. v. Texas*, supra. Cf. *Terrace v. Thompson*, 263 U. S. 197, 216, 6 L. Ed. 255, 274, 44 Sup. Ct. Rep. 15. Petitioner is not liable for the taxes claimed."

Justices Holmes, Brandeis, Stone and McReynolds dissented.

In *Federal Land Bank of St. Paul v. De Rochford*, 287 N. W. 522, the Supreme Court of North Dakota had before it for decision the validity of a non-discrimination license tax upon dealers in motor vehicle fuel, computed at the rate of 3 cents per gallon used and sold by them, and subject to being added to the sales price, when including sales of gasoline by a dealer to a Federal Land Bank for use in carrying out its activities in the State of North Dakota.

The Bank contended that the tax could not be constitutionally imposed upon the dealer for any motor vehicle fuel which it purchased from him for the purpose of carrying on its authorized activities within the State, and that consequently the dealer might not charge the amount of such tax as a part of the price. The defendants, DeRochford and the State Auditor, on the other hand, contended that the motor vehicle fuel sold by DeRochford to the Federal Land Bank must be included in computing the tax and consequently DeRochford might include the amount of such tax in the price.

The Court said:

"The sole question presented for determination on this appeal is whether the State

of North Dakota has the right to impose upon a licensed dealer in motor vehicle fuel a license tax of three cents per gallon upon motor vehicle fuel sold by such dealer to a Federal Land Bank for use in automobiles owned by said Bank and operated by it incidental to its activities in the State."

". . . .

"The decisions of the United States Supreme Court are binding upon this Court and definitely establish, (1) that a Federal Land Bank is an instrumentality of the national government, created by Congress, acting within its constitutional powers, to perform authorized governmental functions, and (2) that such bank is constitutionally endowed with the same immunity from state taxation, that the national government itself would have been endowed with, if it had engaged in such activity directly."

". . . .

"In the Act providing for the establishment of Federal Land Banks (Federal Farm Loan Act) there is a clear intimation that real estate acquired by a Federal Land Bank in the course of its operations under the Act shall be subject to taxation; and there is a specific declaration that 'every Federal land bank . . . including the capital and reserve or surplus therein and the income derived therefrom, . . . first mortgages executed to Federal land banks, . . . and farm loan bonds . . . and the income derived therefrom shall be exempt from . . . State, municipal and local taxation.'

"It is reasonable to assume that when Congress said that a state might not tax a Federal Land Bank, its capital, reserve or surplus, or the income derived therefrom, or first mortgages executed to the Bank, or farm loan bonds, or income derived therefrom, it had in mind direct and

discernible taxes, and that it did not have in mind taxes imposed upon and collected from other persons with whom the Bank might transact business, which might indirectly result in some slight increase in the operating expenses of the Bank. The tax in question here is not a tax upon a Federal Land Bank, or upon its capital, reserve or surplus, or the income derived therefrom. Neither is it a tax upon mortgages executed to such Bank, or upon farm loan bonds, or upon the income derived therefrom. The tax is one upon a dealer in motor vehicle fuel, who has applied for, and who has been granted, a license, under the laws of this State, to engage in business as a dealer in motor vehicle fuel.

"The tax involved here is a tax imposed on dealers for the privilege of engaging in the business of selling motor vehicle fuel, and the amount of the tax is measured by the number of gallons 'used and sold' by the dealer. It is not a tax upon a Federal Land Bank or upon any function which such Bank is authorized to perform. It is not a tax upon any of the powers with which the Bank is vested. The Bank may exercise every function and perform every act that it was created to exercise and perform without one cent of its funds being expended or one cent of its profits being taken away because of this tax. The tax cannot be laid directly upon any activity of the Bank unless it engages in business as a licensed dealer of motor vehicle fuel in this State, and the Bank was not created for the purpose of engaging in such business. The only way in which the funds of the Bank may be expended, even indirectly, in the payment of the tax will be if the Bank purchases motor vehicle fuel from a dealer who includes the amount of the tax in the sales price. But if the operating expenses of the Bank are increased because of the imposition of the tax upon a dealer from whom the Bank purchases motor vehicle fuel, that effect is only incidental and remote and cannot be said to

be a tax upon the Bank, its capital, reserve or surplus, or upon any of the operations of the Bank. Every tax laid upon a dealer will, of course, to some extent be reflected in the price which he charges for the commodity which he sells.

". . . .

". . . the Supreme Court of the United States has held that an occupation tax measured by gross income, where imposed by a state upon a contractor with the United States, is not invalid as a tax upon the Federal Government and its operations, even though the imposition of the tax may increase the cost to the government. *James v. Dravo Contracting Co.*, 302 U. S. 134, 160, 58 S. Ct. 208, 82 L. Ed. 155, 172, 14 A. L. R. 318; *Alward v. Johnson*, 282 U. S. 509, 51 S. Ct. 273, 75 L. Ed. 496, 75 A. L. R. 9.

". . . .

"The tax is general and non-discriminatory. The law imposes the same license tax upon all motor vehicle fuel sold by a licensed dealer without regard to whom the purchaser may be.

" . . . The law does not require that the tax be passed on to the purchaser. The dealer may pay part or all of the tax on all sales or on any sale; but the law says 'every dealer paying such license tax or being liable for the payment thereof, shall be entitled to charge and collect the sum of three cents per gallon, on such motor vehicle fuel sold by him, as a part of the selling price thereof.'

"In this case the dealer (DeRoehford) fixed the price which he charged for the gasoline that he sold to the Land Bank with the tax in mind, that is, in fixing the price he added the amount

Honorable George H. Sheppard, page 10

of the tax he would be required to pay to the State. But the Land Bank was not required to take the gasoline from DeRoehford; it could take it or leave it. If it thought the price too high, it did not have to purchase. If DeRoehford had seen fit to increase the price to the Land Bank over what he charged the public at large, the Bank could not have compelled him to sell to it at a lesser price.

". . . .

"If it were not for the decision of the Supreme Court of the United States in *Panhandle Oil Co. v. Mississippi ex rel. Knox*, supra, we should not think there could be any basis under the rule announced in *McCulloch v. Maryland* for a claim that the imposition by the State of the tax in question here upon a licensed dealer in motor vehicle fuel of a license tax measured by the amount of motor vehicle fuel sold by him would be repugnant to the Constitution of the United States as to such amount of the tax as is based upon motor vehicle fuel sold by him to a Federal Land Bank; but, that decision holds to the contrary; and if the rule of that decision still prevails the license tax prescribed by the laws of this State cannot be constitutionally imposed upon DeRoehford as to the gasoline he sold to the Federal Land Bank.

". . . .

"There are no material differences between the laws of this State under which the controversy here arose and the laws of Mississippi that were involved in *Panhandle Oil Company v. Mississippi ex rel. Knox*. If what the Court said and held in that decision is still in full force and effect, and binding as an authority upon this Court, it would, we think, be decisive here. If the tax involved in that case were unconstitutional it would seem to follow that the tax involved in this case is likewise unconstitutional. We are of

Honorable George H. Sheppard, page 11

the view, however, that decisions of the Supreme Court of the United States made after the rendition of the decision in *Panhandle Oil Company v. Mississippi ex rel. Knox* have so effectively removed the supports on which that decision was said to rest that the decision can no longer be said to be binding as an authority upon the courts of the States. It is true the decision has not been directly overruled; but subsequent decisions of the Supreme Court of the United States establish a rule so inconsistent with the holding in that case, that the decision, in effect, has been overruled. There is no magic in the word 'overruled'. When a court expressly overrules a decision upon which a later decision is predicated, it, of necessity, also overrules so much of the later decision as is predicated upon the decision that is overruled.

"The decision of the Court in *Panhandle Oil Company v. Mississippi ex rel. Knox* evoked rigorous dissent from four members of the Court. While it has been cited in many cases and was followed and made the basis for the decision in *Graves v. Texas Company*, 298 U. S. 393, 56 S. Ct. 818, 80 L. Ed. 1236, it has been distinguished in many subsequent cases (*Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U. S. 572, 50 S. Ct. 419, 579, 74 L. Ed. 1047, 1051; *Alward v. Johnson*, 282 U. S. 509, 514, 51 S. Ct. 273, 75 L. Ed. 496, 499, 75 A. L. R. 9; *Liggett & Myers Tobacco Co. v. United States*, 299 U. S. 383, 57 S. Ct. 239, 81 L. Ed. 294; *James v. Dravo Contracting Co.*, 302 U. S. 134, 151-152, 58 S. Ct. 205, 82 L. Ed. 155, 168, 114 A. L. R. 318), and, in *James v. Dravo Contracting Company*, *supra*, the Court declared that it must be deemed limited to its particular facts. 302 U. S. at page 151, 58 S. Ct. 208, 82 L. Ed. at page 168, 114 A. L. R. 318.

Honorable George H. Sheppard, page 12

"Among the decisions cited by the Court in *Panhandle Oil Co. v. Mississippi ex rel. Knox*, in support of its holding that the tax there involved operated as an unconstitutional burden upon, and interference with, the exercise of national power, are *Dobbins v. Erie County*, 16 Pet. 435, 10 L. Ed. 1022, and *Gillespie v. Oklahoma*, 257 U. S. 501, 42 S. Ct. 171, 66 L. Ed. 338. Particular attention was called to the strictness of this rule as emphasized in *Gillespie v. Oklahoma*, 257 U. S. 501, 42 S. Ct. 171, 66 L. Ed. 338. In *Gillespie v. Oklahoma*, the Court held that the doctrine of immunity inhibited a state from imposing a tax on the net income derived by a lessee from leases of restricted Indian Lands made pursuant to Congressional authority. In *Helvering v. Mountain Producers' Corp.*, 303 U. S. 376, 38 S. Ct. 623, 82 L. Ed. 907, the Court, after careful re-examination of the question, held the decision in *Gillespie v. Oklahoma* to be 'out of harmony with correct principle' and declared *Gillespie v. Oklahoma* to be overruled.

". . . .

"Mr. Justice Butler, author of the opinion in *Panhandle Oil Company v. Mississippi ex rel. Knox*, wrote vigorous dissents in *Helvering v. Mountain Producers' Corp.*, in *Helvering v. Gerhardt*, and in *Graves v. New York*. In his dissenting opinion in *Helvering v. Mountain Producers' Corp.*, he stated that with *Gillespie v. Oklahoma*, there 'necessarily' went 'a long line of decisions of this and other courts', and characterized the result of the decision of the court as constituting a 'sweeping . . . change of construction of the Constitution'. 303 U. S. at pages 390, 391, 38 S. Ct. at page 630, 82 L. Ed. at page 917. In his dissenting opinion in *Helvering v. Gerhardt*, he said:--'In substance, as well as in the language used the decision just announced substitutes for that doctrine (the doctrine of

Honorable George H. Sheppard, page 13

absolute immunity) the proposition that, although the federal tax may increase cost of state governments, it may be imposed if it does not curtail functions essential to their existence. Expressly or sub silentio, it overrules a century of precedents.' 304 U. S. at page 429, 430, 58 S. Ct. at page 980, 82 L. Ed. at page 1442.

"The sweeping change of construction of the constitution', and the application of the controlling principles, announced in the decisions that decreed such change, seem to us to leave no substantial basis for the rule announced in *Panhandle Oil Company v. Mississippi ex rel. Knox*. It seems to us rather that that decision, in effect, has been overruled.

". . . .

"The imposition of the tax is not an exercise or an attempt to exercise by the state of any power 'by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of' (4 *Wheat*. at pages 429-437, 4 L. Ed. at pages 607-609) *The Federal Farm Loan Act*. If regard 'be had to substance and direct effects', and 'merely theoretical conceptions of interference with the functions of government' be laid aside 'there is no sufficient ground for holding that the effect upon the government is other than indirect and remote.' 303 U. S. at pages 386, 387, 58 S. Ct. at pages 627, 628, 82 L. Ed. at page 914. The imposition of the tax upon a dealer for gasoline sold by him to a Federal Land Bank 'neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence' of the Bank. Neither does it operate to control, hinder, or impede the Bank in the performance of any service that it was established to perform for the government. If any of the burden of the tax that is imposed upon the dealer indirectly reaches the Land Bank that

Honorable George H. Sheppard, page 14

'is but a necessary incident to the coexistence within the same organized government of the two taxing sovereigns, and hence is a burden the existence of which the Constitution presupposes.' 304 U. S. at page 424, 58 S. Ct. at page 977, 82 L. Ed. at page 1439."

In *Western Lithograph Co. v. State Board of Equalization* (1936) 11 Cal. (2) 156, 78 Pac. (2d) 731, 117 A. L. R. 838, there was involved a nondiscriminatory state tax, expressly imposed upon the privilege of selling tangible personal property at retail, and measured by the seller's gross receipts. The statute also provided for the collection of the tax, in so far as possible, by the retailer from the consumer, but the act itself made the tax the direct obligation of the retailer. In holding the tax applicable to a sale to a national bank (which the Court assumed to be an instrumentality of the United States, and, as such, not subject to a State tax without the consent of Congress), the Supreme Court of California said:

"Unquestionably the act is nondiscriminatory. It operates upon all alike in the same class, and does not result in exacting more from the federal instrumentality than is paid by other individuals. To conclude that the bank may come into the open market and purchase goods at a price less than other buyers merely by insisting that the amount of a nondiscriminatory tax imposed upon sellers should first be deducted therefrom, is to accord to federal instrumentalities some favor or grace which is not necessarily within the contemplation of the principle of immunity here asserted. It cannot be said that the principle embraces the inherent right in either government to come into the open market and purchase goods at a lower price than paid by other consumers by clipping therefrom the equivalent of nondiscriminatory taxes validly imposed on the seller by the other government,

Honorable George H. Sheppard, page 15

and consequently reduce that government's revenues to a proportionate extent. This view is in harmony with the cases hereinabove cited which recognize and define the inherent limitations of the doctrine of immunity, and follows the pronouncements of the Supreme Court of the United States in its more recent decisions formulating its conclusions on the applicability of the principle and its limitations in relation to other taxing statutes. *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 211, 82 L. Ed. 155, 114 A. L. R. 318, followed in *Silas Mason Co., Inc., v. Tax Commission of Washington*, 302 U. S. 186, 58 S. Ct. 233, 82 L. Ed. 187, and *Atkinson v. State Tax Commission of Oregon*, 393 U. S. 20, 58 S. Ct. 419, 82 L. Ed. 321, Jan. 31, 1938.

"We are aware that statements which might be said to support a contrary conclusion have been made in the cases of *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, 56 A. L. R. 583, *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 51 S. Ct. 601, 75 L. Ed. 1277, and *Graves v. Texas Co.*, 298 U. S. 393, 56 S. Ct. 818, 80 L. Ed. 1236. Those cases involved, respectively, a law of Mississippi imposing an excise tax of one cent per gallon upon the sale of gasoline, a statute of Massachusetts levying an excise tax on sales and a gasoline tax act of Alabama.

"In the case of *James v. Dravo Contracting Company*, supra, the court had before it for consideration the Gross Sales and Income Tax Law of West Virginia, Code W. Va. 1931, 11-13-1 et seq., as amended Acts 1933, 1st Ex. Sess., c. 33, which provided for annual privilege taxes on account of 'business and other activities.' That law imposed upon the contracting company a tax equal to 2 per cent. of the gross income from its business. The

Honorable George H. Sheppard, page 16

imposition of the tax on income derived from a contract with the federal government, executed to further the construction of certain dams, raised the question whether the tax laid a direct burden upon the federal government. The holding was that the tax was not one on the government, its property, or officers, nor was it upon an instrumentality of the government, or upon the contract. The court reiterated and redefined the limitations of the principle of immunity as stated in its former decisions. Although it said, 'The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system,' it applied, as compelling a conclusion that the tax was valid, the limitation on the principle of immunity stated in *Willcuts v. Bunn*, supra, and hereinabove quoted. In the *Dravo Case* the court also said: 'But if it be assumed that the gross receipts tax may increase the cost to the government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work.' The court concluded that the tax provided by the West Virginia statute did not interfere in any substantial way with the performance of federal functions, and was a valid exaction. It expressly declined to consider whether the same result would follow from the application of the principles stated if commodities or goods were furnished rather than services. It refused expressly to overrule the cases of *Panhandle Oil Co. v. Mississippi ex rel. Enox*, *Indian Motorcycle Co. v. United States*, and *Graves v. Texas Co.*, supra, but noted that in those cases the taxes were held to be invalid because laid on the sales to the respective governments,

Honorable George H. Sheppard, page 17

and further that theretofore those cases had been distinguished and must be deemed limited to their particular facts. Notwithstanding the holdings or expressions in the cases distinguished, it must here be concluded that a proper construction of the Retail Sales Tax Act of California is that the tax is not on the sale, but rather that it is a tax in the same category as property and excise taxes payable by an independent contractor engaged in the business of retail sales which, although they are reflected in the higher cost of the product or commodity offered, must be considered merely as a necessary expense of conducting the business. It is a tax computed on the gross receipts from the conduct of the business of the retail merchant. Essentially, as intimated in *Metcalf & Eddy v. Mitchell*, supra, there does not appear to be any sound basis for a distinction because the receipts affording the measure of the tax are derived from the retail business conducted by an independent contractor or merchant, rather than from the sale of services, where otherwise the imposition is nondiscriminatory. Clearly the imposition of a privilege tax on the retailer of commodities does not interfere with the power of the government to borrow money; nor does it affect in any substantial manner the efficiency of its agency in the performance of its duties, nor the ability of the persons taxed to discharge their contractual obligations to the government, nor the ability of the government to procure the services of private individuals to aid them in their undertakings.

"Following the path pointed by the court in the *Dravo Case*, we conclude that the tax on the retailer under the Retail Sales Tax Act of this state imposed on the basis of a return which includes receipts derived from sales of tangible personal property to the bank, a federal instrumentality, does not unduly burden the federal government nor interfere with the exercise of the governmental functions delegated to its instrumentality, and was therefore validly imposed."

Honorable George H. Sheppard, page 18

We are not unmindful of the holding in *Federal Land Bank v. Bismark Lumber Co.* (1941) 314 U. S. 95, 86 L. Ed. 65, 62 S. Ct. 1. The North Dakota tax of two per cent upon the gross receipts from all sales of tangible personal property was, by statute, to be added by the retailer to the sales price and, when so added, to constitute a part of such price and to be a debt from the consumer or user to the retailer, who was forbidden to assume or absorb it. The Supreme Court of the United States held the North Dakota tax invalid as applied to lumber and other building materials purchased by the Federal Land Bank to effect necessary repairs and improvements to buildings and fences on farm properties acquired by it through mortgage foreclosure in the course of its operations. But the Court pointed out that the statute made the purchaser liable for the tax. In *Western Lithograph Co. v. State Board of Equalization*, supra, the Supreme Court of California acknowledged that if the tax were a tax on the consumer or purchaser of the goods sold, it would be invalid when applied to sales to a national bank. But the tax here in question is upon the retailer, not the purchaser, so we submit that the Bismark case, supra, is not in point.

In *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. Ed. 3, 62 S. Ct. 43, 140 A. L. R. 615, Chief Justice Stone said:

"The asserted right of the one (government) to be free of taxation by the other does not spell immunity from paying the added cost attributable to the taxation of those who furnish supplies to the government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Mississippi* and *Graves v. Texas Co.*, supra, we think it no longer tenable."

Alabama v. King & Boozer, supra, involved an Alabama tax of 2 per cent on the gross retail sales price of tangible personal property, laid on the seller as the "taxpayer," but required to be added to the sales price and collected by him from the purchaser. The Court held that such tax did not infringe any constitutional immunity of the United States from State taxation, "when imposed with respect to lumber sold on the order of 'cost-plus-a-fixed-fee' contractors, for use by the latter in constructing an army camp for the United States, where the United States was

Honorable George H. Sheppard, page 19

not in fact the 'purchaser' within the meaning of the tax statute." See 140 A. L. R. 621 for an excellent annotation.

In view of the above authority, we are of the opinion that you correctly advised Joske Bros. Co. that it was liable for the tax. We are further of the opinion that the Comptroller General's decision is not applicable to the facts involved in your opinion request.

Trusting that the above fully answers your letter,
we are

Very truly yours

ATTORNEY GENERAL OF TEXAS



BY

Thos. B. Duncan Jr.
Thos. B. Duncan
Assistant

TBD:fo

APPROVED MAY 7, 1943

Gerard C. Mann
ATTORNEY GENERAL OF TEXAS